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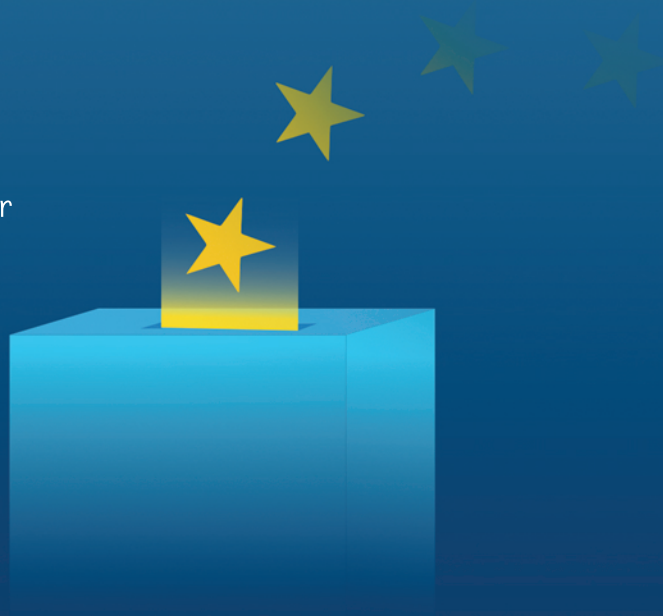
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EU Internal Security: Countering Threats and/or  
Respecting Fundamental Rights

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**Robert Schuman Centre for Advanced Studies**

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European Parliament elections in May 2019 come at a critical time in the evolution of the EU as these will be the first elections after the expected departure of the UK (March 2019) and at a time when divergence on many issues characterises member state relations. Wider global developments weigh heavily on Europe with the return of hard geopolitics and efforts to undermine the global multilateral order. The European University Institute (EUI) wants to highlight the major issues that are at the heart of the political agenda at this juncture as a contribution to the debate. The papers are part of a wider programme on the elections including the development of a Voting Advice Application (VAA), euandi2019, and an online tool specifically tailored for mobile EU citizens voting either in their country of citizenship or residence, spaceu2019.

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## **Abstract**

The EU's cooperation on internal security is a policy valued by member states. Indeed, the threats of terrorism and different forms of organised crime continue to be serious problems requiring the close cooperation of EU law enforcement authorities. A challenge of a different nature is the EU's 'rule of law' crisis, which undermines trust in the independence of judicial authorities – a precondition for many instruments in the Area of Freedom, Security and Justice to work smoothly.

This policy paper looks ahead and presents two directions in which to develop the field of EU internal security. First, the EU may focus on strengthening fundamental rights and civil liberties within policies driven by a security rationale. The objective would be to maintain open societies and avoid the risk of Orwellian-style surveillance systems. Second, it may go in the opposite direction by improving the law enforcement toolbox and getting tougher on irregular migrants, criminals and terrorist suspects. This response can be framed as a strategy to appease a nationalistic wave and counter discontent with an 'out-of-touch' elite. Irrespective of the question of what to do, the EU will also have to decide how to proceed. The EU may either strengthen cooperation on the basis of intergovernmentalism or move towards a federalisation of European policing, although full federalisation including providing Europol with executive powers is not advised as an option.

## **Keywords**

EU internal security; fundamental rights; counter-terrorism; European Parliament; EU 'rule of law'-crisis'.





## Challenges to EU internal security

“The attacks are less sophisticated, there are more, but fortunately they produce less victims.” With these words, Manuel Navarrete of Europol’s European Counter Terrorism Centre summarised the current EU threat situation deriving from religiously inspired terrorism (European Parliament 2018). In 2017, 68 people died and over 844 were injured as a result of terrorist attacks. By comparison, 150 people died in 2015. In Europol’s view, better policing tools and reinforced European cooperation have contributed to a decreasing death toll. “The plots are identified earlier because the tools for intelligence and police are used in a more accurate way” (ibid). However, radicalised individuals continue to pose a security threat, not only returnees from conflict zones in Syria and Iraq but also ‘home-grown terrorists’ radicalised within the EU. Europol believes that terrorists only rarely intermingle with migrants and refugees to enter Europe. “We haven’t seen a systematic use of these routes by terrorists” (ibid).

The threat of terrorism therefore continues to be high on the agenda for the EU although migration-related issues have tended to provoke more policy controversies. There is a nexus between migration and internal security, notably with regard to migrant smuggling and trafficking. These issues need to be separated. Refugees and low-skilled migrants from poor countries have few opportunities to legally enter the EU. More than 90 percent of the migrants coming irregularly use smuggling networks and services, which are often provided by criminal groups. This has become a business generating billions of euros (Europol 2018). Human trafficking is widely understood as a form of modern slavery and implies the exploitation of (vulnerable) persons for activities such as forced labour or prostitution. Most of the victims are female (around 80 percent) and come from within the EU (65 percent) (European Commission 2014).

These crime areas constitute only a part of the overall picture regarding security threats in the EU. According to the EU Serious and Organised Crime Threat Assessment (SOCTA), there are about 5,000 internationally operating organised crime groups. Europol regards these groups as ‘poly-criminal,’ given that 45 percent of them are involved in more than one criminal activity (Europol 2017a: 15). Document fraud, money laundering and the online trade in illicit goods, notably drugs, are key business domains.

Some EU countries have recently seen a very different kind of threat. Organised crime groups have prevented journalists from investigating high-level corruption cases. In October 2017, Daphne Caruana Galizia, a Maltese journalist focusing on corruption, was killed by a car bomb. In February 2018, Ján Kuciak, a Slovak investigative journalist, was shot dead together with his fiancée.<sup>1</sup> These killings sparked public outcry and triggered unpleasant questions about ties between officials and politicians and international crime syndicates. The European Parliament was particularly outspoken in these cases, claiming that they were not only of relevance to Slovakia and Malta but to the whole EU. It required wider European action to allow journalists to remain engaged in sensitive investigations.

More broadly, the EU’s ‘rule of law’ crisis may affect EU cooperation on internal security. In December 2017, the European Commission triggered a so-called ‘article 7’ process against Poland due to concerns over the government’s influence on the judiciary. This process may lead to a suspension of Poland’s voting rights in the Council of the EU. The European Parliament triggered the same process against Hungary in September 2018. A report by MEP Judith Sargentini accused Viktor Orbán’s government of posing a ‘systemic threat’ to the rule of law in Hungary and the fundamental values of the EU. If the independence of the judiciary is in question, it may undermine the trust on which EU internal security instruments are based. For instance, the judiciaries of other member states may increasingly question whether judgements in Hungary and Poland leading to a European Arrest Warrant are of sufficient independence to be respected. According to the European Court of Justice, EU member states already have the right to refrain from executing a Polish arrest and extradition request if they

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<sup>1</sup> In October 2018, the killing of a third journalist, Viktoriya Marinova, who was investigating corruption and fraud with EU money in Bulgaria, caused another public outcry. However, the police quickly arrested a suspect in Germany and assumed there was no political motive to kill her.

believe the person concerned may suffer from “a real risk of breach ... of fundamental” human rights (judgement in case C-216/18). Without basic trust in the separation of powers, EU cooperation with high stakes in human rights and civil liberties will be hampered more and more.

## **Where Europe is at in the field of internal security**

Unlike other policy fields, the EU’s added value is rarely questioned in the field of internal security. A 2017 Special Eurobarometer survey on Europeans’ attitude towards security demonstrates high support. 92 percent of respondents believed their national authorities should share information with the authorities of other EU member states to fight crime and terrorism better. Challenges to internal security remained “important” priorities for EU citizens, notably terrorism (95 percent) and organised crime (93 percent) (European Commission 2017).

The fact that EU cooperation on internal security is appreciated by member states can be seen in the context of the United Kingdom’s (UK) Brexit process. British officials have repeatedly stated that Brexit should have “no impact whatsoever” on the UK’s relations with Europol, the European Police Office (The Telegraph 2017). Besides Europol, the UK is also highly concerned about possibly losing access to EU databases and data-sharing tools and about being excluded from the European extradition regime, which allows speedy extradition of wanted individuals within the EU (House of Commons 2018).

But what is the EU doing exactly in the field of internal security? The EU’s treaties have sought to strike a fine balance between a functional need for more ‘Europe’ in this field and member states’ prerogatives of national sovereignty. The overall objective is to strengthen the operational cooperation of law enforcement authorities and to enhance the compatibility of the different legal systems in the EU. Put differently, the EU is not seeking to replace national police authorities with European ones or to come up with a uniform EU criminal law for its member states. The principle of mutual recognition is a cornerstone of criminal law instruments such as the European Arrest Warrant. It implies that member states no longer look at the substantive reason for the warrant but simply recognise the decision by a judicial authority of another member state.

Broadly speaking, the EU is active in three areas: (1) law development; (2) operational cooperation; and (3) information exchange and analysis. Regarding legal measures, the EU may adopt laws to approximate certain aspects of crime-fighting, for instance on money laundering or terrorist financing. Operational cooperation is often facilitated by EU agencies. The European Border and Coast Guard Agency (Frontex) deals with migration- and border-related issues, while Europol is a key actor in crime-fighting. It has become a “high tech organisation” (Robert 2016) pooling a variety of EU and national databases. According to its 2016-2017 Annual Report, in 2016 more than 1.5 million searches were performed in its databases and every month law enforcement authorities exchanged 72,000 operational messages through Europol, with an annual total of 870,000 (Europol 2017b: 7).

The sharing of information is a key element of EU cooperation. A specialised agency for the management of large-scale IT systems, called ‘eu-LISA,’ manages the Schengen Information System II (SIS II), the Visa Information System (VIS) and Eurodac. While these databases have different contents (for instance, Eurodac contains the fingerprints of asylum seekers in the EU), the EU is keen to strengthen their interoperability. Put simply, police officers may get access to multiple EU information systems (police and judicial cooperation, migration and borders) with just one query. While this seems an attractive prospect for policemen, it raises questions about data security and privacy.

## **How to develop EU internal policy – the policy options**

Which policy options does the EU have with regard to internal security? Change can always occur along two dimensions: first, a *substantive dimension* concerning the content of a policy; and second, a

*procedural dimension* concerning modes of governance and the roles of actors (for details, see Trauner and Ripoll Servent 2015).

### ***Option 1: Liberty trumps security***

“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.” Benjamin Franklin, an American revolutionary and diplomat, is often quoted when discussing surveillance and control in today’s world. Indeed, the relative importance attributed to civil liberties and human rights is a key question in the field of EU internal security. Option 1 is to focus on how to consolidate these rights and liberties. The EU need not be driven by the idea that security has to be strengthened by all means.

Our digitalised world has created new opportunities for crime-fighting. The question of rights and liberties is therefore pertinent with regard to data security and privacy. Does the compilation of data covering more and more areas of citizens’ daily life enhance their security? Or, on the contrary, does it risk becoming a security threat in itself? Civil liberties advocates have long urged the EU to do “better instead of more information sharing” (Bigo et al. 2016). From such a perspective, large-scale databases only rarely lead to the disclosure of terrorist plots but greatly enhance the risks of false hits. The 2013 Snowden revelations of large-scale surveillance and the Cambridge Analytica scandal, in which social media data were misused, are expressions of the risks associated with data-gathering. Data-gathering and -sharing should therefore be limited and more accountability should be introduced.

The question of the balance between liberty and security also concerns other issue areas. Should the rights of victims of human trafficking be enhanced within an EU approach primarily aimed at catching human traffickers? How to deal with the children and women of European jihadists who are keen to return from Syria or other conflict zones – are they primarily victims or co-perpetrators of terrible crimes? Which rights shall be given to irregular migrants in the EU’s intensified fight to dismantle smuggling networks? In all of these questions, advocates of civil liberties and human rights may emphasise a need to re-calibrate a dominant security rationale.

### ***Option 2: Countering populism by enhancing the security toolbox***

Option 2 puts stronger emphasis on the value that a higher degree of security for Europeans brings about. A nationalistic wave driven by right-wing populist parties is often seen to threaten the Western model of liberal democracy. In such a reading, the election of US President Donald Trump and the Brexit vote are expressions of an increasing gap between liberal elites and ‘ordinary folks.’ If the EU wants to regain the trust of these voters, it may not focus on protecting minorities and advancing human rights. It has to deliver tangible results – and they may be at the expense of fewer rights for terrorist or criminal suspects and irregular migrants. The line of thinking is that if (mainstream) politicians are not able to tackle security and societal problems, radical parties and politicians will rise and enact more extremist approaches.

A reflection of this thinking can be found at the EU level. In the EU’s policy on irregular migration, for instance, on 12 September 2018 the Commission proposed recasting the EU’s ‘Return Directive,’ suggesting among other things longer detention for irregular migrants to tackle the risk of absconding. According to a Commission official, the public reaction to these changes has been very different to that in 2008 when the initial law was adopted. In 2008, there was a public outcry depicting the law as a ‘directive of shame’ for its allegedly over-restrictive character. In its 2018 proposal, the Commission was instead seen as not going far enough, regardless of its openly declared intention to enhance the restrictiveness of the law (interview with the author, 28 September 2018).

Another example can be found in the EU’s international relations. To counter the threat of terrorist attacks and reduce the number of migrants being smuggled into the EU, it is increasingly cooperating with authoritarian governments. In September 2018, for instance, the EU started a ‘migration dialogue’

with Abdel Fattah al-Sisi, the Egyptian president, in order to stem irregular migration. Sebastian Kurz, the Austrian chancellor holding the Presidency of the Council of the EU, suggested that “strong and effective partners” such as Egypt will be key to controlling irregular migration (quoted in the Financial Times 2018). There were few complaints about the widespread human rights violations in the North African country.

In a nutshell, option 2 is to strengthen the ‘realpolitik’ approach of the EU, focusing on how to further narrow the room for manoeuvre of smugglers and terrorist suspects, and also of irregular migrants.

### ***Strengthening intergovernmental cooperation or federalising European policing?***

The question of *what* shall be done is closely interrelated with the question of *how* these changes could be realised. There are very few voices saying that the EU’s competences in the field of internal security should be repatriated to the national level. The UK’s struggle to stay engaged with Europol is an ample example of the fact that even the country most keen to ‘take back control’ is perceiving a benefit from cooperating with the EU on internal security.

The other end of the spectrum is more contested. Should the EU’s cooperation on internal security be strengthened in a purely intergovernmental manner or should we move towards a more federal system of policing and crime-fighting? In the latter camp is French President Emmanuel Macron, who recently called for a “European intelligence academy” to strengthen transnational counter-terrorism cooperation (Politico.eu 2017). The idea of creating such a new security institution often goes hand-in-hand with calls to strengthen Europol and create a ‘European FBI.’

A key difference between Europol and the FBI is the use of executive powers. Is it an option to provide such powers to an EU agency? At present, it still seems far-fetched to imagine a situation in which, for instance, a German Europol officer takes the lead in the arrest of a Polish criminal suspect in Warsaw. Europol officials are themselves reluctant to subscribe to such a vision, arguing that the different historical experiences, legal cultures and languages of European countries make a federalist vision of European policing difficult to realise (interview with the author, 27 September 2018).

However, Europol’s power and competences can be further enhanced without subscribing to a *finalité* version of a European FBI. Europol could be given more resources and investigative competences. An example is its engagement in the investigation of the assassinations of the Maltese and Slovak journalists. Following calls from the European Parliament, Europol has assisted the national authorities and engaged in liaising with members of the European Parliament (ibid). Europol may add a ‘European dimension’ to investigations touching on politicised questions such as state capture and high-level corruption and strengthen their impartiality. Such cases are likely to continue occurring in the EU.

An important role in tackling the same challenges may also be taken by the European Public Prosecutor’s Office (EPPO). This was set up to investigate and prosecute crime affecting the EU’s financial interests. As of 2018, twenty-two member states participate in the Office, which will become fully operational by the end of 2020. The European Commission (2018) has already started to push for the EPPO to be allowed to deal with cross-border terrorist threats. A European-level prosecution may lead to a more structural and integrated Union response to terrorist offences in the EU.

EU agencies may also act more ‘on the ground’ in the member states. According to the EU’s hotspot approach, for instance, Europol officers operate along with other EU agencies and national authorities to check their databases for information on certain migrants and asylum seekers. This cooperation creates a *de facto* (not *de jure*) integrated European administration in member states facing high migratory pressures. Similar developments could be envisaged for states having to cope with persistent threats of terrorist attacks or entrenched organised crime groups.

Probably the biggest difference between a more intergovernmental and a more federal vision of crime-fighting concerns accountability mechanisms. Should the democratic control over Europol, other

EU policing actors and their data-sharing instruments primarily take place through member states? Or should the EU's supranational institutions, notably the European Parliament, become the prime actors to perform accountability and rule of law evaluations? This would require a willingness to change the rules of the game. "A key obstacle to ensuring 'more EU added value' in the field of counterterrorism policies has been the limits of EU legal competence in questions related to 'national security' and the activities of intelligence services" (Bigo et al. 2016). So far, the EU has refrained from putting the accountability mechanism primarily at the EU level. For instance, Europol is accountable to a management board drawn from all the member states but it also reports to a 'Joint Parliamentary Scrutiny Group' (JPSG) consisting of members of the European Parliament and national parliaments.

## **Conclusions**

The EU has substantially developed its policies on internal security. Its instruments such as the European Arrest Warrant, its databases and data-sharing mechanisms are now used on a day-to-day basis by policemen all over Europe. Europol, the European Police Office, has become a high-tech organisation adapting the work of European law enforcement authorities to the digital era.

This policy paper has outlined two directions for change, both of which relate to the relative importance attributed to human rights and civil liberties in an EU policy driven by a security rationale. The EU has not only the (extreme) option of weakening or strengthening this security rationale. It can go for in-between approaches such as cooperating with authoritarian regimes while putting in place stringent human rights safeguards. A specific development, however, would certainly be an improvement for the EU: to get out of its crisis-and-react mode of policy-making. After the 2015 terrorist attack in Paris, Europol was asked to open a Counter Terrorism Centre; after the 2015/2016 migration crisis, it added a European Migrants Smuggling Centre. Developing a more proactive approach and showing political determination to remove obstacles to cooperation early on would be real progress. Two priority areas could be: first, an approach for post-Brexit UK-EU cooperation to avoid the UK being marginalised in Europe's transnational policing; and second, preventing the EU's rule-of-law crisis from deepening further and undermining Europe's Area for Freedom, Security and Justice.

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